Acme Bus Corp., Brookset Bus Corp., Bauman & Sons Buses, Inc., Alert Coach Lines, Inc., and Local 868, International Brotherhood of Teamsters, AFL-CIO/District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, Joint Petitioners and Local 144, Service Employees International Union, AFL-CIO, Petitioner. Cases 29-RC-8162 and 29-RC-8167

February 10, 1995

DECISION AND CERTIFICATION OF REPRESENTATIVE

By Chairman Gould and Members Stephens and Truesdale

On March 2, 1994, the National Labor Relations Board, by a three-member panel, granted the Joint Petitioners' request for review of the Regional Director's Decision and Direction of Second Election and remanded the case to the Regional Director for a hearing on the Employer's Objection 4.1 Following a hearing on the matter, Hearing Officer Ariella Bernstein, on June 1, 1994, issued the Hearing Officer's Report and Recommendation on Objections (pertinent portions are attached), finding that the objection should be dismissed and the Joint Petitioners should be certified as the exclusive collective-bargaining representative of the employees in the appropriate unit.² Thereafter, the Employer filed exceptions and a brief with the Board, and the Joint Petitioners filed a brief in support of the hearing officer's report.

The Board has considered the record in light of the exceptions and briefs and affirms the hearing officer's rulings, findings,³ and conclusions and adopts her recommendation that a Certification of Representative should issue.

In affirming the hearing officer's findings, we agree that the Employer failed to meet its burden to show that the outcome of the July 30, 1993 election was af-

fected by Local 144's July 26 dissemination of a leaflet that falsely stated that the election had been postponed or that the leaflet was the cause of the low voter turnout in that election. The tally of ballots establishes that of 1151 employees deemed eligible to vote, 404 cast ballots for the Joint Petitioners, 13 cast ballots for Local 144, and 281 cast ballots against the participating labor organizations, and there were 37 challenged ballots and 4 void ballots. Of the 425 individuals who failed to vote, the voter eligibility list used in the election establishes that 92 were home employees and employees on vacation or layoff⁴ who would not have reported to the Employer's bus yards for work prior to the election, and therefore, would not likely have seen the Board's July 29 notices posted at those yards that refuted the false information in Local 144's leaflet and advised that the election was to be conducted as scheduled.⁵ Assuming facts most favorable to the Employer, i.e., that the 37 challenged ballots were all cast against representation, it was incumbent on the Employer to show that 73 employees of the 92 home/vacationing employees received the leaflet or learned of its contents and did not vote because they reasonably relied on the leaflet's message that the election had been postponed.⁶ As stated, the Employer did not do so. Of the five witnesses called by the Employer to testify concerning receipt of the leaflet, one stated that he had no opportunity to go to the Employer's facilities between the time he received the leaflet and the election and that he believed the election had been canceled. Another, who was not a home driver, stated that she received the leaflet prior to the election and believed that the election was canceled and did not see the Board's notice or otherwise learn that it would be conducted even though she went to one of the bus yards on election day.7 The three remaining Employer witnesses and two witnesses called by the Joint Petitioners all testified that they received the leaflet but learned from various sources prior to the election that

¹The Employer's Objection 4 alleges that approximately 200 home drivers, 200 matrons, plus the employees who were on vacation, were led to believe that the election was canceled when Local 144 mailed all employees a leaflet 4 days before the election erroneously announcing that the Board had postponed the election.

The Board's Order remanding the case states, in pertinent part, the "Joint Petitioners' Request for Review . . . raises substantial issues regarding the extent to which the leaflet falsely announcing the post-ponement of the election was disseminated by the Petitioner Local 144 among unit employees shortly before the election."

² The unit is all full-time and regular part-time drivers, drivers' assistants, and mechanics.

³The Employer has excepted to some of the hearing officer's credibility resolutions. The Board's established policy is not to overrule a hearing officer's credibility findings unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Coca-Cola Bottling Co. of Memphis*, 132 NLRB 481, 483 (1961). We have carefully examined the findings and find no basis for reversing the findings.

⁴The list, as corrected at the hearing, in fact shows 94 such employees, but the names of 2 individuals appear twice.

⁵In addition to the Board's notice, the Joint Petitioners distributed approximately 2500 fliers at the bus yards and at the destination schools of home drivers. These fliers likewise indicated that the election was to be conducted as scheduled.

⁶The hearing officer concluded that to set the election aside, the Employer had to establish that 86 employees were disenfranchised by the leaflet for a possible total of 404 votes against representation—the number of votes received by the Joint Petitioners. That calculation however, ignores the 13 votes cast for Local 144 which, despite being votes for union representation, would count as votes against representation by the Joint Petitioners. Adding those 13 votes to the votes cast against representation plus the 37 challenged ballots, we find that the number of disenfranchised voters that could be determinative of whether the Joint Petitioners received a majority is 73.

⁷The election was conducted at two sites away from the Employer's facilities at its request.

it would proceed as scheduled.⁸ Accordingly, the record fails to establish, in numbers sufficient to affect the outcome of the election, that the leaflet kept employees from voting in the election.

In this connection, we reject the Employer's contention that it need only show dissemination of the leaflet. First, the order remanding the case for a hearing indicates that the evidence sought concerns the extent of dissemination of the leaflet. Second, although the Board will set aside an election where the conduct of a party to the election causes employees to be disenfranchised, it will do so only if the ballots of those employees could be determinative. Borg Warner Corp., 254 NLRB 597 (1981).9 Thus, the mere showing of a mathematical possibility that the number of nonvoting employees could affect the outcome of the election will not suffice. To the contrary, in order to prevail on its Objection 4 the Employer had to establish widespread dissemination of the leaflet among the nonvoting population and circumstances which could show a connection between the false information and their failure to vote. For the reasons stated by the hearing officer, we agree that the record indicates something far less than extensive dissemination of the leaflet, and as stated above, we find that the testimony of the seven witnesses who received the leaflet fails to establish that it caused a determinative number of employees not to vote.

We note, too, that the Employer was apprised of its burden at the opening of the hearing in this matter, if not before, and that the hearing was conducted on 3 nonconsecutive days, April 15 and 20 and May 2, 1994, giving the Employer ample opportunity to investigate and gather enough information to meet its burden. Further, contrary to the Employer's assertion, it would not have violated the Section 7 rights against coercive interrogation to ask the employees who did not vote, as an investigative matter and at the hearing: (1) whether they received the leaflet; (2) whether they learned that the election was to be conducted anyway; and (3) whether the false leaflet caused them to refrain from voting. Such a line of questioning would not be intrusive under the circumstances and certainly does

not seek to determine the employees' union sentiments. In any event, assurances against reprisal could have been given prior to questioning. *G.H. Bass Caribbean, Inc.*, 306 NLRB 823 (1992).

On the basis of all the foregoing, we find that Objection 4 should be overruled and that a Certification of Representative should issue.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 868, International Brother-hood of Teamsters, AFL-CIO/District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO, as Joint Petitioners and that the Joint Petitioners are the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers, drivers' assistants and mechanics employed by Acme Bus Corp., Brookset Bus Corp., Bauman & Sons Buses, Inc., Alert Coach Lines, Inc., single employer, at its Bohemia, Northport, Westbury/Jericho, and Westhampton, New York, locations, excluding all other employees, office clerical employees, guards and supervisors within the meaning of the Act.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS

Upon a petition filed on May 19, 1993, by Local 868, International Brotherhood of Teamsters, AFL-CIO (Local 868) and upon an amended petition filed during the representation hearing naming District Lodge 15, International Association of Machinists and Aerospace Workers, AFL-CIO (District Lodge 15), as Joint Petitioners, and upon a petition filed by Local 144, Service Employees International Union, AFL-CIO (Local 144) and pursuant to Decision and Direction of Election issued by the Regional Director for Region 29, on July 1, 1993, an election by secret ballot was conducted on July 30, 1993, in a unit of all full-time and regular part-time drivers, drivers' assistants and mechanics employed by Acme Bus Corp., Brookset Bus Corp., Bauman & Sons Buses, Inc., Alert Coach Lines, Inc., a single employer (the Employer) at its Bohemia, Northport, Westbury/Jericho, and Westhampton, New York locations, excluding all other employees, office clerical employees, guards, and supervisors within the meaning of the Act.

The tally of ballots served on the parties at the conclusion of the election showed the following results:

Approximate number of eligible voters–1151
Number of void ballots–4
Number of votes cast for Joint Petitioner–404
Number of votes cast for Local 144–13
Number of voted case against participating labor organizations(s)–281
Number of valid voted counted–698
Number of challenged ballots–37

⁸ Home driver Kuczewski called the Employer and learned that the election would be held. Home driver Ellington and nonhome driver Van Syckle both received the leaflet but learned over the two-way radios in their vehicles that the election was still scheduled. Ellington voted in the election. Two other employees who stated that they received the leaflet testified they learned that the election was being conducted but did not specify how they came by this information. We note that Kuczewski testified to having conversations with five other employees who received the leaflet, but they were not called to testify and the record does not disclose whether they became aware of the conduct of the election. Even assuming that those five never learned that the election would be run, the Employer still has not come close to meeting its burden of showing that the votes of voters who relied on the leaflet could have been determinative.

⁹ See also Yerges Van Liners, 162 NLRB 1259 (1967).

Number of valid voted counted plus challenged ballots-735

Challenges are not sufficient in number to affect the results of the election.

A majority of valid votes counted plus challenged ballots has been cast for Joint Petitioners.

Thereafter, on August 6, 1993, the Employer filed timely objections to the conduct of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, as amended, the Regional Director for Region 29 caused an administrative investigation to be conducted concerning the Employer's objections. Thereafter, on October 8, 1993, the Regional Director for Region 29, issued a Supplemental Decision on Objections and Direction of Second Election, wherein he directed that Employer's Objection 4 be sustained, that the July 30, 1993 election be set aside, and that a second election be conducted. The Regional Director overruled the Employer's remaining objections. On March 2, 1994, the National Labor Relations Board issued an order granting Joint Petitioner's request for review of the Regional Director's Supplemental Decision on Objections and Direction of Second Election, with respect to Objection 4, and remanded the case to the Regional Director for a hearing concerning the extent of dissemination of a Local 144 preelection leaflet among bargaining unit employees. On March 23, 1994, the Regional Director for Region 29 issued an order and notice of hearing in Cases 29-RC-8162 and 29-RC-8167, for the purpose of eliciting testimony regarding the extent of dissemination of the Local 144 leaflet among bargaining unit employees.

In accordance with the Board's March 2, 1994 Order and the Regional Director's March 23, 1994 Order and Notice of Hearing, a hearing was held before me on various dates in April and May 1994, concerning the dissemination of Local 144's leaflet among bargaining unit employees. All parties were represented by counsel, were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, to present oral argument, and to file briefs.

In accordance with the Board's March 2, 1994 Order and the Regional Director's March 23, 1994 Order and Notice of Hearing and upon the entire record of this case, consisting of the transcript and exhibits, including my observation of the demeanor of the witnesses who testified and the specificity of their testimony, I make the following findings of facts and credibility resolutions and issues this report and recommendations to the Board.

The Employer is a New York corporation with its principal office and place of business located at 3355 Veterans Memorial Highway, Ronkonkoma, New York, and other locations in Bohemia, Northport, Westbury/Jericho, and Westhampton, New York, where it is engaged in providing bus transportation services.

Background

The alleged objectionable conduct centers on a Local 144 leaflet erroneously advising employees, essentially, that the July 30, 1993 election was cancelled due to a postponement request granted by the Region. According to the leaflet, the election was postponed to an unspecified date in September 1993. It is undisputed that on July 29, 1993, after it became

aware of the leaflet and its contents, the Region prepared a notice advising employees, inter alia, that the election was to be conducted as scheduled, on July 30, 1993, that any information concerning cancellation thereof was inaccurate, and that any information concerning the election was available from the Board's official notices of election. The Employer posted the aforementioned notice at each of its four locations and distributed the notice to those employees who worked out of these four locations. The Employer's objection arose because two groups of its employees may not have received the Board's July 29, 1993 reaffirmation of the July 30, 1993 election date, and thus, may have been led to believe that the election was either cancelled or postponed. The Employer's Objection 4 alleges verbatim, as follows:

Local 144, Service Employees International Union, AFL–CIO, sent a letter announcing that the Labor Board cancelled the election The company posted a Notice from the Labor Board saying that Local 144 lied, but the home drivers, which consists of 200 vehicles plus 200 matrons for a total of 400 people plus those on vacation were led to believe that the election was cancelled.

The home employees do not report to any of the Employer's four locations. Rather, they go directly from their homes to their routes, thereby precluding them from receiving or reviewing the Board's July 29, 1993 notice that the election was proceeding as scheduled. Vacationing and laid-off employees, may have received Local 144's leaflet, but not the Board's disavowal thereof. There were approximately 416 employees who did not vote in the July 30, 1993 election, of which 86 are home employees, and 18 are either vacationing or laid-off employees.¹ The remaining 312 nonvoters are from neither category. The Board remanded the case for a hearing to elicit testimony regarding the dissemination of Local 144's leaflet among unit employees.

During the course of the hearing, Local 144's business agent, Tito Vargas, organizers Daniel Best, Frank DeStefano, and Jean Marency, former coordinator Jean Smith, data entry clerk Monica Clarke, and mailroom employee Robert Darmanie, testified about the process employed by Local 144 in addressing, filling, and mailing envelopes containing the leaflet. Union President Frank Russo and Director of Organizing Trevor Kellman also testified as to their knowledge of the mailing.

Data entry clerk Monica Clarke testified that Local 144's internal documents show that, on July 22, 1993, organizer Daniel Best received² two sets of computer generated mail-

¹Counsel for the Region provided to all the parties, and offered into evidence Board Exh. 2, consisting of a list of the names of home, vacationing, and laid-off employees who did not vote in the election. Objections to receipt of this document into evidence were raised because Board Exh. 2 was not properly authenticated. Based on such objections, the hearing officer conducted an in-camera inspection of Board Exh. 2 against the *Excelsior* list utilized at the election, and received into evidence Board Exh. 3, a corrected version of Board Exh. 2, pursuant to the in-camera inspection.

² Clarke neither prepared the mailing labels, nor did she give the labels to Best. Clarke's information came from a system processing log, Emp. Exhs. 8 and 9, which was prepared by Clarke's former supervisor who is no longer employed by Local 144. According to Clarke, she recognized the handwriting on the system processing log,

ing labels for employees employed by the Employer. According to Clarke, the mailing labels are randomly compiled and not in alphabetical order.

Business Agent Tito Vargas testified that on the day that the leaflet (Emp. Exh. 2) was mailed, he arrived at work at 9 a.m., and affixed computer generated mailing labels on envelopes.3 The envelopes were in preparation for mailing of either a notice postponement of the election (Emp. Exh. 2), which had not yet been prepared, or a standard campaign leaflet asking the Employer's employees to vote for Local 144 in the upcoming election (Tr. 52)4. While awaiting instructions on which leaflet to mail, he affixed the labels on the envelopes. When Vargas left the Local 144 offices at 11 a.m., no decision was made as to which leaflet to mail, and he had not completed placing all the mailing labels on the envelopes (Tr. 44, 53). When Vargas returned to the Local 144 offices at about 4 p.m., he saw a large bin in the lobby filled with approximately 550 envelopes, but did not look at the labels thereon or the contents therein. The bins in the lobby always contain the Union's afternoon mail to be picked up by the mailman (Tr. 34-35). On the sixth floor of the Union's offices, Vargas saw boxes of an unidentified number of unsealed envelopes, one of which contained Employer's Exhibit 2 (Tr. 38-39), the offending leaflet. Vargas asked mailroom employee Robert why the boxes of envelopes were not mailed. Mailroom employee Robert explained that he ran out of time, that the envelopes ready for mailing were already in the lobby (Tr. 46-47), and that there was insufficient time to complete the many that had yet to be done (Tr. 50). Based on this conversation with Robert, Vargas assumed that all the envelopes in the bin in the lobby were envelopes that he labelled earlier in the day (Tr. 46), and they contained Employer's Exhibit 2.

Contrary to Clarke's testimony, organizer Daniel Best testified that he did not receive any labels from either Clarke or her supervisor in late July 1993.⁵ Sometime prior to the election, Best arrived at the Union's offices. On the sixth floor,⁶ Best saw a table with a stack of leaflets identified as Employer's Exhibit 2, empty envelopes, and pages of computer generated labels.⁷ After Best picked up some of Employer's Exhibit 2, a batch of envelopes, and some computer generated labels, Best stuffed about 25–30 envelopes with Employer's Exhibit 2,⁸ and affixed labels thereon. Best placed the 25–30 stuffed envelopes in an empty envelope box (Tr. 390) located on the table where the Employer's Ex-

hibit 2 originated.⁹ When Best returned to the union offices at 4 p.m. on the same day, the box with the envelopes was no longer on the table where Best left it. According to Best, the Union's mailing procedure normally involved bringing the mail to employee "Robert" to seal, and mail, or, employee "Robert" would pick up the mail.¹⁰

Organizer Frank DeStefano testified that sometime during the last week of July 1993, he found a 6-inch stack of approximately 50–60 Local 144 envelopes with mailing labels thereon, and a pile of xeroxed copies of the Employer's Exhibit 2, on his desk. DeStefano testified that he placed Employer's Exhibit 2 into approximately 30–40 addressed envelopes found on his desk, 11 and placed the filled envelopes in an empty cardboard box, which previously held empty envelopes (Tr. 279, 280). DeStefano gave the box to a secretary, whose name he did not recall, and instructed her to give the box to mailroom employee Robert Darmanie for mailing. 12

Organizer Marency testified that he never saw Employer's Exhibit 2 because the instant campaign was not his assignment. Although Marency testified that about 1 week before the election, he placed about 30 to 35 labels on envelopes and stuffed the envelopes with leaflets, he did not know which leaflet he stuffed into the envelopes. On direct examination, Marency testified that he never saw Employer's Exhibit 2 but did see Local 868's Exhibit 2, a campaign leaflet, 13 on the shelf in the Union's offices. On cross-examination, however, Marency testified that he never saw Local 868's Exhibit 2. When questioned about his activities on July 28, 1993, 2 days prior to the election, while at the union offices, Marency testified that he was at the union offices for 2 to 3 hours, but he was only killing time, "doing his own business" (Tr. 510).

Local 144's former coordinator¹⁴ Jean Smith testified that there were only two mailings to the Employer's employees during July 1993 (Tr. 453). One was mailed 1 week prior to the election, and the second, Employer's Exhibit 2, was mailed during the last week of July 1993 (Tr. 456, 457). Smith testified that Employer's Exhibit 2 may have been mailed on the day that Director of Organizing Kellman was

Emp. Exh. 9, as that of her former supervisor. Clarke testified that the document notes that the mailing labels were given to Daniel Best. Although Joint Petitioners assert that the document was not properly authenticated, I am placing little weight on it for reasons discussed infra.

³ According to Vargas, the labels were randomly divided among other Local 144 employees for each to place on envelopes, thus, the labels were not placed on the envelopes in any particular order.

⁴ Vargas testified that during that morning, Director for Organizing Kellman gave him instructions not to do anything regarding a post-ponement (Tr. 567).

⁵According to Best, the only time he received any mailing labels was early on in the campaign.

⁶The organizing floor.

⁷ According to Best, all literature that is to be mailed to membership is left on the table for the organizers to mail.

⁸This was the only time that Best saw Emp. Exh. 2.

⁹Best did not recall if the cardboard box had other stuffed envelopes therein.

¹⁰ Although Best testified that other organizers were also stuffing envelopes with leaflets, Best could not identify if the leaflet was indeed Emp. Exh. 2. As noted above, Local 144 was contemporaneously preparing a second mailing of campaign leaflets to unit employees. Inasmuch as the organizers named by Best testified during the hearing, I place greater weight on their own accounts of their actions rather than Best's account.

¹¹ DeStefano did not stuff the remaining 20 addressed envelopes and left them alongside any remaining leaflets on his desk. Upon arrival at his office the following day, the addressed envelopes and leaflets were gone.

¹² On direct examination, DeStefano testified that other organizers were also stuffing envelopes with Emp. Exh. 2, but on cross-examination, he testified that he assumed the leaflets were Emp. Exh. 2.

¹³Local 868's Exh. 2 is relevant to these proceedings inasmuch as one unit employee testified that he received the leaflet at about the same time that Emp. Exh. 2 was mailed. See employee James Ellington's testimony, described infra.

¹⁴ According to Smith, she handled mostly clerical duties, including answering telephones and mailings. When Smith was involved in mailings, she did not necessarily read the documents being mailed (Tr. 437).

out of the office (Tr. 455), which she believed to be Wednesday, July 28, 1993 (Tr. 470). Smith testified that on that day, she affixed labels on about 20-30 envelopes, and stuffed them with leaflets (Tr. 483). Smith recalled seeing Employer's Exhibit 2 (Tr. 434) and Local 868's Exhibit 215 (Tr. 453, 454), but she could not recall which leaflet she stuffed into the labelled envelopes (Tr. 438, 484), although there were no other campaigns on which she worked at that time. Smith indicated she placed the 20-30 stuffed envelopes in a cardboard box on her desk, which box previously held 500 empty envelopes. According to Smith, any envelopes that were stuffed on that day were placed by organizers Marency, Best, and DeStefano on Smith's desk, which Smith, in turn, placed with her own 20-30 envelopes in a cardboard box on her desk (Tr. 481-483). Although she did not know the number of envelopes in the cardboard box, she estimated that the box could hold about 100-150 stuffed envelopes. 16 At the end of the day, Smith told mailroom employee Robert that the contents of the cardboard box were ready for mailing. The box was not on her desk on the following morning.

Mailroom employee Robert Darmanie testified that he seals and places postage on Local 144's mail by placing the mail through a metered mail machine. All of the Union's mail is placed in a large United States Postal Service bin, which Darmanie takes to the lobby at 4:30 p.m., for mailing (Tr. 223-224). Darmanie testified that during the month of July 1993, he was responsible for placing postage on two separate large mailings, one of which involved a membership meeting mailing consisting of 1500-2000 pieces of mail, which Darmanie believed was mailed during the middle of July 1993 (Tr. 243-244). Darmanie testified that the second large mailing came to him in a cardboard box, from an unnamed organizer. The box previously held 500 empty envelopes, but now contained a few hundred envelopes (Tr. 260). Darmanie passed through the postage meter all of the envelopes in the cardboard box given to him by the unnamed organizer, placed them in a United States Postal Service bin with the remainder of the Union's mail for that day (Tr. 250–251), and took that bin to the lobby at approximately 4 p.m. According to Darmanie, he posted and mailed these envelopes on only 1 day, either July 26 or 28, 1993, despite Employer's Exhibits 4 and 6, which had different postmark dates (Tr. 237).¹⁷ Darmanie never saw Employer's Exhibit 2, and did not know to which campaign it related.

Generally, Local 144's President Frank Russo testified that he neither knew about, nor saw, Employer's Exhibit 2 on the day it was mailed, but saw it about 1 week prior to his testimony in this matter. Director for Organizing Trevor Kellman testified that on July 26, 1993, he was out of the office, but that he spoke with Business Agent Vargas on the telephone regarding the election. Despite attempts to refresh his memory, Kellman did not recall the elements of his conversation

with Vargas. Kellman testified that on July 27, 1993, he conducted an investigation into the mailing of Employer's Exhibit 2, but did not ask, or find out, how many were mailed.

During the course of the hearing, a total of seven employees testified regarding their receipt of the leaflet. The Employer called employees Raymond Hamlin, Galaida Bettina, Ursula Szobonya, Joanne Kuczewski, and Lilly Johnson to testify.

Raymond Hamlin, a home driver, testified that he received Employer's Exhibit 2 sometime prior to the election, although he did not recall precisely when. The envelope containing Employer's Exhibit 2 addressed to Hamlin is postmarked July 26, 1993 (Emp. Exh. 3). Hamlin testified that after his receipt thereof, he had no opportunity to go to any of the Employer's yards and assumed the election was cancelled.

Non-home employees Galaida Bettina and Ursula Szobonya, mother and daughter, each received Employer's Exhibit 2 in envelopes postmarked July 28, 1993 (Emp. Exhs. 4 and 5). Although both became aware that the election was to take place on July 30, 1993, and that the election was not cancelled, 18 they did not see the Regional Director's July 29, 1993 notification, nor did they hear any announcements by the Employer or its representatives.

Employee Joanne Kuczewski, a home driver during the week of the election, testified that she received Employer's Exhibit 2 one day prior to the election.¹⁹ Because five other employees²⁰ told Kuczewski that they also received Employer's Exhibit 2, Kuczewski called the Employer and was told that the election was to proceed as scheduled on July 30, 1993.

Non-home employee Lilly Johnson testified that she received Employer's Exhibit 2 during the week prior to the election and was annoyed that the election was cancelled.²¹ Although Johnson was at the Employer's facility on the day of the election, she did not see the Regional Director's notice that the election was not cancelled, and did not become aware that the election was not cancelled.

During the hearing, Local 868 called employees Nerry Van Syckle and James Ellington to testify.

Non-home employee Nerry Van Syckle received Employer's Exhibit 2 prior to the election, which led her to call Employer Safety Director Basile. Although Basile told Van Syckle that he would investigate the matter, Van Syckle heard over the two-way radio on her bus that the election was not cancelled. She also saw the Regional Director's notification regarding the correct election date posted on the bulletin board at the Employer's Bohemia yard.

Finally, home employee James Ellington testified that he received Employer's Exhibit 2²² about 2 to 3 days prior to the election, but the following day, Ellington heard over the

¹⁵ She saw Local 868's Exh. 2 on the shelf behind her desk. As previously noted, Local 868's Exh. 2 was received by one unit employee, James Ellington, as thus, the presence of Local 868's Exh. 2 is relevant to this proceeding.

¹⁶ The cardboard box previously held 500 empty envelopes (Tr.

¹⁷ Darmanie testified that the large mailing given to him by the organizer was posted and mailed on either July 26, 1993 (postmark date on Emp. Exh. 4) or July 28, 1993 (postmark date on Emp. Exh. 6), but it was not mailed on both days.

¹⁸ Galaida Bettina testified that she voted in the election on July 30, 1993.

¹⁹ No envelope addressed to Kuczewski was submitted.

²⁰ Although Kuczewski testified about other employees, the employees mentioned did not testify.

²¹ No envelope addressed to Johnson was submitted.

 $^{^{22}\,\}mathrm{No}$ envelope addressed to Ellington containing Emp. Exh. 2 was submitted. Ellington testified that four or five other employees told him that they received Emp. Exh. 2, and that some of these employees told Ellington that they voted. None of these employees were called as witnesses.

two-way radio in his van that the election was not cancelled. He also saw the Regional Director's notification of the correct election date posted on the bulletin board at the Bohemia yard.²³ Ellington testified that he voted in the election. Ellington also testified that he received Local 868's Exhibit 2, a campaign leaflet completely different from Employer's Exhibit 2, about 1 week prior to the election. However, the envelope addressed to Ellington containing Local 868's Exhibit 2 was postmarked on July 28, 1993 (Local 868's Exh. 3).

Local 868 President Joseph Moran testified that on July 27, 1993, he became aware of the distribution of Employer's Exhibit 2, and thereafter, on July 28, 1993, Local 868 prepared and distributed about 2500 campaign leaflets along with directions to the polling place (Local 868's Exhs. 6A and 6B). In the afternoon of July 28, 1993, Local 868 prepared about 2500 leaflets specifically explaining to employees that the July 30, 1993 election was not canceled (Local 868's Exh. 7). Moran testified that on July 28, 1993, he mailed said leaflet to the Employer's employees, and on July 29, 1993, Moran and other Local 868 employees handed out the leaflet at the Employer's three locations and at some of the schools²⁴ for whom the Employer's home employees drive routes. On July 30, 1993, the day of the election, Moran and other employees of Local 868 and the Employer distributed a sample ballot card (Local 868's Exh. 8) to the Employer's employees at the Employer's three locations and at the schools for which the Employer's home employees

In light of the above, having carefully considered the demeanor of the witnesses while testifying, the internal inconsistencies and contradictions in the testimony, conflicts with documentary evidence in the record and the inherent probabilities of event, I make the following credibility resolutions and find as follows:

The Generation of the Mailing Labels

I credit the testimony of Local 144's data entry clerk Monica Clarke regarding the computer generated mailing labels inasmuch as she answered questions in a straightforward manner, without hesitation, even on cross-examination. Although I find Clarke's testimony to be credible, her testimony is immaterial to the issue herein inasmuch as requests or receipt of mailing labels have no bearing on the extent to which Local 144's leaflet was disseminated among unit employees. Even assuming that organizer Best received two sets of mailing labels, 25 such facts fail to establish the number of unit employees to whom Local 144's leaflet was sent.

The Decision to Mail Employer's Exhibit 2

I credit the portion of Business Agent Vargas' testimony that, while he awaited instruction from Director for Organizing Kellman as to which leaflet to mail, he placed mailing labels on an unidentified number of envelopes. According to Vargas, he was instructed by Kellman to "do nothing," and left the Union's offices at 11 a.m. Although it was necessary to recall Vargas to ask about his conversation with Kellman, I credit this portion of his testimony based on the directness and uniformity of his answers. I credit the testimony of Kellman inasmuch as he answered questions on direct and cross-examination in a straightforward and honest manner.²⁶ Although Kellman did not completely corroborate Vargas' version of their conversation, I do not believe that Kellman's failure to recollect the extent of his conversation with Vargas is sufficient grounds for discrediting either Vargas or Kellman. Thus, I find that Vargas and Kellman discussed the possibility of election postponement, and that when Vargas left the Union's offices at 11 a.m., no decision had been made with respect to which leaflet to mail. For the reasons described infra, I do not credit the portion of Vargas' testimony regarding the number of envelopes he saw in the postal bin in the lobby upon his 4 p.m. return to the Union's of-

Stuffing of the Envelopes

Initially, I note that Best, DeStefano, Smith, and Marency testified about the number of envelopes each other may have labelled, or stuffed with Employer's Exhibit 2. However, when each witness was pressed on cross-examination, none could identify whether the leaflet placed into the envelopes was indeed Employer's Exhibit 2. Accordingly, I will not credit that portion of each of their testimony and place greater weight on their accounts of their own activities, rather than the activities of others. I credit the testimony of organizer Daniel Best, based on the directness of his answers on both direct and cross-examination. Although Best was softspoken, he answered consistently and uniformly without hesitation. Best testified that at one time prior to the election, he stuffed 25-30 envelopes with Employer's Exhibit 2, affixed labels thereon, and placed them in an empty envelope box on a table. I credit the testimony of organizer DeStefano, regarding the number of envelopes he stuffed with Employer's Exhibit 2. Although I note that DeStefano was slightly anxious, which may have caused him to prematurely answer questions on direct and cross-examination prior to completion of the questions, I credit his testimony based on the consistency and uniformity of his answers. DeStefano filled between 30 and 40 preaddressed envelopes with Employer's Exhibit 2, and asked his unnamed secretary to give the envelopes to the mailroom employee to mail.

I am troubled by Marency's testimony, based solely on his demeanor. His answers were incoherent requiring the questioner not only to repeat the question, but also repeat Marency's disjointed answer to be sure it was understood. Marency was not only fidgety, but hostile to the questioners and generally reluctant to answer questions without express direction from the hearing officer to do so. When asked what he did when at the Union's offices on the Wednesday before the election, Marency flippantly answered that he just "killed"

²³ Although home employees do not travel to the Employer' yard, Ellington went to the yard every other day to fill up his van with fuel. When Ellington visited the yard prior to the election, he saw the Regional Director's notice to employees.

²⁴ Moran did not specify the number or names of schools where they distributed the leaflet.

²⁵ Best denied that he received any mailing labels at the end of July 1993.

²⁶ Although I credit Kellman's testimony, I find that the remainder of his testimony regarding his investigation of the mailing of Emp. Exh. 2 has no bearing on the instant case inasmuch as he had no information concerning the number of leaflets that were mailed and he was not present at that time.

time." Notwithstanding my concerns regarding Marency's demeanor, I am certain of only one part of his testimony; that he placed about 30 to 35 labels on envelopes. I am uncertain, however, what he did with those labelled envelopes thereafter. When asked what was placed in the envelopes, Marency testified that he never saw Employer's Exhibit 2, but had seen Local 868's Exhibit 2, on the shelf in the Union's office. When asked on cross-examination if he could have stuffed Local 868's Exhibit 2, rather than Employer's Exhibit 2, into the envelopes, Marency contradicted his direct testimony and said that he never saw Local 868's Exhibit 2. Based on his demeanor and his inconsistent answers, I cannot determine with any degree of certainty that Marency stuffed his envelopes with Employer's Exhibit 2. However, I credit the portion of Marency's testimony that he labelled 30 to 35 envelopes.

I credit the testimony of former coordinator Jean Smith inasmuch as she answered questions on both cross and direct examination uniformly and consistently. Smith recollected that Employer's Exhibit 2 was mailed on Wednesday, July 28, 1993. Smith stuffed between 20 to 30 envelopes but she could not be sure whether she stuffed the envelopes with Employer's Exhibit 2, or with Local 868's Exhibit 2. Because Smith repeatedly testified that she could not definitively determine which leaflet she placed in the envelopes she labelled, I cannot determine with any certainty that Smith filled the 20 to 30 envelopes she labelled with Employer's Exhibit 2.

The testimony of employee Ellington reinforces my findings regarding the contents of the envelopes labelled by Marency and Smith. Ellington, whose testimony I find to be credible based on his calm demeanor and the straightforward and consistent manner in which he answered questions on both direct and cross-examination, testified that he received both Employer's Exhibit 2 and Local 868's Exhibit 2, two separate documents. The postmark stamp on the envelope containing Local 868's Exhibit 2 is dated July 28, 1993.²⁷ Smith credibly testified that she stuffed envelopes on that day, and although she was not sure with what, Ellington's envelope postmarked on July 28, 1993, containing Local 868's Exhibit 2, leads me to believe that Local 868's Exhibit 2, and not Employer's Exhibit 2, could have been placed in Smith's envelopes. Indeed, Smith testified that a stack of Local 868's Exhibit 2 was on the shelf behind her desk. Given that neither Smith nor Marency could recall if they stuffed their envelopes with Employer's Exhibit 2 or Local 868's Exhibit 2, that a stack of Local 868's Exhibit 2 was stored behind Smith's desk, and that at least one employee received both exhibits in the mail, it is entirely possible that Local 868's Exhibit 2 was available to be, and may have been, placed in Marency and Smith's 50 to 65 labelled envelopes. In view of the foregoing, I find that there is insufficient evidence to establish that Employer's Exhibit 2 was placed in Smith and Marency's 50 to 65 envelopes, but that Best and DeStefano's envelopes, totaling 55 to 70, did contain Employer's Exhibit 2.

The Envelopes in the Cardboard Box

With regard to the empty cardboard box, Smith testified that it previously held 500 empty envelopes, but after placing her envelopes and those of Best, Marency, and DeStefano therein, the box on her desk contained a total of 100 to 150 envelopes. Best and DeStefano's credited testimony however, was that they placed their envelopes containing Employer's Exhibit 2 either in a cardboard box on a table, or handed the cardboard box to an unnamed secretary. Although the testimony regarding the location of the cardboard box conflicts, in my opinion, it is more than a mere coincidence that anyone who stuffed envelopes with either Employer's Exhibit 2 or Local 868's Exhibit 2, placed them in a different, but similar, type of cardboard box that originally contained 500 empty envelopes. Moreover, it appears that when adding the number of envelopes stuffed by each individual organizer, it totals to between 105 and 135,28 a close approximation of the number of envelopes which Smith asserts were in the cardboard box on her desk. Accordingly, it appears that Smith and Marency's 50 to 65 envelopes, whose contents I have found did not contain Employer's Exhibit 2, were placed with Best and DeStefano's 55 to 70 envelopes, containing Employer's Exhibit 2, in the same box. In my opinion, the inherent probability of events leads me to conclude that any envelopes stuffed by Smith, Best, Marency, and DeStefano, containing either Employer's Exhibit 2 or Local 868's Exhibit 2, ended up in a cardboard box whose contents were taken by mailroom employee Robert to mail. Based on the foregoing, I find that, at most, 150 envelopes in the box ended up in Robert's possession for mailing. Of the 150 envelopes in the box, at most 70 envelopes contained Employer's Exhibit 2.

The Mailing of the Envelopes in the Box

Mailroom employee Robert Darmanie became flustered a few times during his testimony because he appeared confused by counsels' questions. Although Darmanie was softspoken, he answered straightfowardly, honestly, and consistently both on direct and cross-examination. Darmanie testified that on either July 26 or 28, 1993,²⁹ he placed postage on a few hundred envelopes which he received in an cardboard box.³⁰ After posting the envelopes, he placed them in a United States Postal bin with the remainder of the days mail, and at 4 p.m., placed the bin in the lobby. Darmanie

²⁷ Notwithstanding Ellington's testimony that he received Local 868's Exh. 2 one week prior to the election, I place greater weight on the documentary evidence establishing a specific postmark date.

²⁸I found that Emp. Exh. 2 placed by Best and DeStefano into 55 to 70 envelopes, and that Local 868's Exh. 2 could have been placed by Smith and Marency into 50 to 65 envelopes.

²⁹ By showing Darmanie envelopes (Emp. Exhs. 3 through 7), the Employer attempted to impeach Darmanie's testimony that he postmarked all the envelopes in the cardboard box on the same day. However, the addressee of Emp. Exhs. 6 and 7, postmarked July 26, 1993, did not testify about the envelope or its contents. Accordingly, I have no knowledge as to what document was in those envelopes. Three of the remaining four envelopes presented into evidence (Emp. Exhs. 4 and 5 and Local 868's Exh. 3) were postmarked July 28, 1993, and based thereon, I credit Darmanie that he postmarked the contents of the cardboard box on 1 day only.

³⁰ Although Darmanie's testimony that he received the box from an organizer conflicts with Smith's testimony, I conclude that the envelopes in the cardboard box were in Darmanie's custody at some point, and it is irrelevant whether it was handed to Darmanie or if he picked it up.

never saw the contents of the envelopes he posted, or Employer's Exhibit 2. Although I generally credit Darmanie's testimony, I do not credit the more vague portion of his testimony that there were "a couple of hundred" stuffed envelopes in the cardboard box, over Smith's testimony. Further, Smith's estimate of the number of envelopes in the cardboard box was 100 to 150 envelopes, a number that is substantially supported by the cumulative evidence that between 105 to 135 envelopes stuffed by the Union's organizers ended up in Smith's box. Based thereon, I find that Darmanie was given, at most, 150 envelopes, not a couple of hundred, to mail. With respect to the number of envelopes in the bin in the lobby, Business Agent Vargas testified that, at 4 p.m., the bin contained approximately 550 sealed envelopes. According to Vargas, Darmanie told him that the envelopes in the lobby were ready for mailing, but there was insufficient time to postmark the envelopes on the sixth floor. When Vargas saw that one of the unmailed envelopes in the boxes on the sixth floor contained Employer's Exhibit 2, Vargas assumed that all the envelopes in the lobby also contained Employer's Exhibit 2. However, the bin in the lobby contained all of the Union's afternoon mail. Moreover, Vargas did not see the contents of the envelopes and did not look at the labels affixed thereon. Thus, the mail that Vargas saw in the bin could have contained 150 envelopes from the cardboard box, and any additional envelopes the Union wished mail that afternoon. Based on the foregoing, I find that at most, between 135-150 envelopes in the bin in the lobby contained either Employer's Exhibit 2, or Local 868's Exhibit 2, but that the remaining envelopes' contents are unknown. Inasmuch as I have already found that between 55 to 70 envelopes contained Employer's Exhibit 2,31 I find that at most, 70 of the envelopes in the bin contained Employer's Exhibit 2 which falsely notified employees that the election was cancelled.

In its posthearing brief, the Employer asserts that the mere distribution of Employer's Exhibit 2 to a "huge segment of the employee population" requires setting aside the election without reaching the effects of Employer's Exhibit 2 on the voting employees. Contrary to the Employer's view, I have found that Employer's Exhibit 2 was mailed to, at most, 70 employees, out of a total of 1151, and not to a "huge segment of the employee population." Although I believe that dissemination of Employer's Exhibit 2 to 70 employees appears rather insignificant relative to the large size of the unit, I do not base my recommendations solely thereon.

The Employer argues, essentially, that limited distribution of the leaflet is sufficient to set aside the election, even if employees became aware that the leaflet was false, and that the election was not cancelled.³² Upon questioning during

the hearing regarding this issue, the following conversation ensued:

H.O.: even assuming that 150 leaflets went out, what happens if the . . . leaflets went to employees who voted?

PEARL: It is totally irrelevant. The fact is equally plausible that those 150 told others they received this literature.

H.O.: We don't even have that evidence.

PEARL: The contamination, the possibility is enough to upset the conditions this agency needs to run a fair election . . . once it is out . . . it cannot be cured by subjective questioning.

Although the Employer asserts that dissemination of the leaflet, or effects thereof, are incurable, the Board does not necessarily subscribe to that view.33 In Sahuaro Petroleum, 306 NLRB 586 (1992), the Board held that where the conduct of a party to an election causes an employee to miss the opportunity to vote, the Board will find that conduct to be objectionable if the employee's vote is determinative and if the employee was disenfranchised through no fault of his own. Citing Versail Mfg., 212 NLRB 592, 593 (1974). If, however, an employee is prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of a party or the Board, the inability to vote is not a basis for setting aside the election. Id. Based on the above, I believe that the mere distribution of the Local 144 leaflet to 70 employees is insufficient grounds to set aside an election without first adducing if the employees eventually knew that the election was to proceed as scheduled. In this connection, it is relevant to know if the employees heard from other sources that the election was to proceed on July 30, 1993. If the employees who received the leaflet did not vote because they did not learn that the election was, in fact, not

agreed to postpone the July 30, 1993 election. In Midland National Life Insurance Co., 263 NLRB 127 (1982), Shopping Kart Food Market, 228 NLRB 1311 (1977), and Metropolitan Life Insurance Co., 266 NLRB 507 (1983), the Board held it would set elections aside if a party misrepresented the facts or the law by forging documents, thereby deceiving the voters, and rendering them unable to recognize the propaganda for what it is. Although the Employer asserts that the factual content of the Local 144 leaflet supports a misrepresentation finding under the cited cases, the Board will not probe into the truth or falsity of the parties' campaign propaganda material and does not set aside elections based on misleading propaganda. See Midland National Life and Shopping Kart, supra. Moreover, the leaflet herein is clearly identifiable as a document prepared by Local 144, it is on Local 144 stationary and was sent in Local 144 envelopes. Accordingly, I find that Emp. Exh. 2 does not constitute misrepresentation of Board action.

³³Local 868 President Joseph Moran testified about the leaflets he mailed and handed out to the Employer's employees regarding the correct election date. I credit Moran, based on the directness of his answers, and honest manner in which he testified. Moran, and other employees of Local 868, tried to refute the allegations in Emp. Exh. 2, and communicate the inaccuracy thereof to the employees. If it could be established that Moran's curative efforts were directed toward employees who in fact received Emp. Exh. 2, I would find his testimony more helpful. However, the record evidence does not establish the extent that Emp. Exh. 2 was disseminated among the employees to whom Moran spoke. In these circumstances, I am unable to base my recommendations herein on Moran's curative efforts.

³¹ Union President Frank Russo testified that he had no knowledge of the mailing of Emp. Exh. 2 to the Employer's employees, however, I am not persuaded that the president of the Union did not know anything about the mailing until 1 week before the hearing. While on the stand, Russo, who was subpoenaed, told the hearing officer that he 'resented' (Tr. 365) being called to testify, and was generally belligerent to counsel during questioning. Based on his demeanor, I do not credit Russo's testimony. Even if I had credited Russo, his testimony did not shed any light on the extent of dissemination of Emp. Exh. 2.

³²In its posthearing brief, the Employer also asserts that Emp. Exh. 2 constituted misrepresentation by Local 144 that the Region

cancelled, arguably, the leaflet prevented employees from voting. However, once armed with the knowledge that the leaflet was inaccurate, the employees' choice not to vote can no longer be attributed to the leaflet alone.

The burden is on the objecting party, here the Employer, to prove that employees who did not vote were prevented from doing so because they received the leaflet but never knew, or had the opportunity to know, that the election was proceeding as scheduled.34 To assist the Employer, counsel for the Region provided a list of names of 94 home, laidoff, and vacationing employees who did not vote.35 In order for the Employer to show that the leaflet affected the results of the election, 86 nonvoting home employees would have to testify that they received Employer's Exhibit 2, but had no opportunity to know, or did not know that the election was not, in fact, cancelled. If 86 employees so testified, the Employer would tie the count with the Joint Petitioners.³⁶ If, however, 9 of the 94 nonvoting home employees testified that they did not receive Employer's Exhibit 2, or that, after their receipt thereof, they knew, or became aware that it was inaccurate, yet failed to vote, Joint Petitioners would still retain their majority of the valid votes counted.³⁷

A total of seven employees testified, and their testimony is useful in determining whether their failure to vote was attributable to Employer's Exhibit 2, Local 144's leaflet announcing the cancellation of the election. I credit the testimony of all seven employees based on their consistent and uniform testimony and on the straightforward and honest manner in which they answered questions on both direct and cross-examination. After their receipt of Employer's Exhibit 2, three of the four non-home employees testified that they became aware that the election was not cancelled from either the Regional Director's notification posted on the Employer's bulletin board, Employer announcements over the bus radio, or from other unknown sources. The fourth employee, Johnson, testified that she received the leaflet, but that she had no opportunity to go the Employer's facility thereafter, and never found out that the election was not cancelled. Accordingly, it appears that only one non-home employee's failure to vote was attributable to her receipt of Employer's Exhibit

With regard to the home employees, counsel for the Region prepared and submitted into evidence a list of all home, vacationing, and laid-off employees who did not vote in the July 30, 1993 election (Bd. Exh. 3). Despite my urging, the Employer did not present any employees from that list. Of the three home employees presented, two testified that they became aware that the election was not cancelled either from the Regional Director's notification posted on the Employer's bulletin board, Employer announcements over the bus radio, or by speaking to Employer representatives about the election date. The third employee, Hamlin, testified that he had no opportunity to go the Employer's facility, and did not hear from any other source that the election was not postponed. However, Hamlin's name is not listed among the nonvoters in Board's Exhibit 3. Thus, Hamlin voted in the election, and Employer's Exhibit 2 did not cause him to miss his opportunity to vote.

Any effects of Employer's Exhibit 2 was cured when employees were made aware from different sources that the election was to proceed on July 30, 1993, as scheduled. Of the three home employees who testified, two became aware that the election was not cancelled, and all three home employees who testified, voted, thereby diluting any impact Employer's Exhibit 2 had on them. With respect to the nonhome employees, there is no documentary evidence to clarify if the four who testified voted in the election.³⁸ It is clear, however, that three of the four non-home employees had notice that the election was proceeding on July 30, 1993. Once these employees understood that the election was not cancelled, any failure to vote is a fault of their own. Blame no longer rests on Local 144's leaflet when the employees had sufficient and adequate notice that the leaflet was false and the election was to proceed on schedule. It appears that only one non-home employee, Johnson, did not vote because she did not know that the election was proceeding on July 30, 1993. Johnson received Employer's Exhibit 2, and was not apprised that it was false.³⁹ Accordingly, based on the testimony of the employees, I find that Employer's Exhibit 2 did not prevent employees Raymond Hamlin, Bettina Galaida, Ursula Szobonya, Joann Kuczewski, Neri Van Syckle, or James Ellington from voting inasmuch as they had sufficient notice of the leaflet's inaccuracy, and adequate opportunity to vote. By providing only one non-home employee who did not know that the leaflet was inaccurate, and that the election was not cancelled, the Employer failed to meet its burden to prove that the dissemination of Employer's Exhibit 2 affected the outcome of the election. One nonvoting, non-home employee does not affect or change the election results.⁴⁰

Moreover, contrary to the Employer's assertion, one nonvoting employee does not establish that the low voter turnout is directly attributable to Local 144's leaflet. The Board has held that election results should be certified where

³⁴ Campbell Products Department, 260 NLRB 1247 (1982). It is the burden of the objecting party to come forward with evidence in support of its objection.

³⁵The home, laid-off, and vacationing employees would not have as great an opportunity to learn that the Local 144 leaflet was false and that the election was to proceed as scheduled. Thus, the Region provided a list of these employees from which the Employer could chose.

³⁶ If one assumes that the 37 challenges are all votes against both participating labor organizations, the Employer would have received its 281 votes, plus the 37, totaling 318 votes. Accordingly, the Employer would need 86 votes to tie the 404 votes received by Joint Petitioners. Thus, 86 nonvoters must testify that they received Emp. Exh. 2, and did not know that it was false and that the election was proceeding as scheduled.

³⁷ If 9 of the 94 nonvoting home employees testify that they received Emp. Exh. 2, knew that it was false and that the election was not cancelled, or that they never received Emp. Exh. 2, yet did not vote, the remaining 85 (94 minus 9) nonvoting home employees would not be sufficient for the Employer to tie the election results (i.e., 318 plus 85 totals 403).

 $^{^{\}rm 38}\,\rm With$ the exception of employee Ellington and Galaida, who testified that they voted.

³⁹There is no documentary evidence in this record to establish which non-home employees voted. Only a list of nonvoting home employees was submitted into evidence because the employees would not have as great an opportunity to learn that the election was not cancelled.

⁴⁰ If nine nonvoting home employees testified that they did not receive the leaflet, or that they received the leaflet, but did not vote for another reason, Joint Petitioner's would have retained a majority.

all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter turnout. See Lemco Construction, 283 NLRB 459 (1987). In Lemco, supra, the Board held that if a Board election is met with indifference, it must be assumed that the majority of eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an adequate opportunity to participate in the balloting will the Board decline to issue a certification and direct a second election. Thus, the Board will issue a certification where employees had adequate notice and opportunity to vote and were not prevented from voting by the conduct of a party or by the unfairness in the scheduling or mechanics of the election. In the instant case, of the 416 nonvoters, I found that, at most, 70 received Local 144's leaflet, leaving 346 employees who did not receive the leaflet, yet failed to vote. If 346 employees did not receive the leaflet, the circumstances leading to their failure to exercise their opportunity to vote are not material to the certification of the election.⁴¹ Of the 70 employees that may have received the leaflet, only 1, Johnson, was not afforded an opportunity to vote because she did not know that the leaflet was false and that the election was proceeding as scheduled. If the remaining 69 recipients of the leaflet knew that leaflet was inaccurate and that the election was indeed scheduled for July 30, 1993, as did employees Hamlin, Galaida, Szobonya, Kuczewski, Van Syckle, and Ellington, their failure to vote was within their control, and not attributable to the leaflet. Because I know of only one recipient, Johnson, whose opportunity to vote was impaired by the leaflet, I cannot attribute the low voter turnout thereto. Therefore, the Employer failed to meet its burden to prove that the dissemination of the Local 144 leaflet either affected the outcome of the election or was responsible for the low voter turnout.

Based on the foregoing, I recommend that Employer's Objection 4 be overruled.

Summary and Recommendations

I recommend that Employer's Objection 4 be overruled. As the tally of ballots shows that the majority of valid votes has been cast for Petitioner, I recommend that a Certification of Representative be issued.

⁴¹ See *Lemco*, supra.